U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-P-M-, INC.

DATE: OCT. 26, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a manager of commercial real estate, seeks to permanently employ the Beneficiary as a senior programmer analyst under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). The Director, Texas Service Center, denied the petition and a following motion to reopen. The matter is now before us on appeal. The appeal will be dismissed.

The Director initially concluded that the record did not establish the Beneficiary's possession of the qualifying education for the offered position. After reopening the matter, however, the Director found that the Petitioner did not demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. Accordingly, he denied the petition again on December 9, 2014 and the Petitioner's most recent motion on February 24, 2015.

The record shows that the appeal is properly filed and alleges specific errors of law and fact. The record documents the procedural history of the case, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all relevant evidence of record, including new evidence properly submitted on appeal.[1]

I. THE PETITIONER'S ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

[1] The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal. The petitioner stated that it would submit a brief and additional evidence within 30 days of filing the appeal. However, as of this decision's date, we have received no additional materials from the petitioner. Therefore, our decision is based on the entire record before us.

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If the petitioner did not pay the beneficiary the full proffered wage each year, we next examine whether it had sufficient annual net income or net current asset amounts to pay the difference between the wage paid, if any, and the proffered wage.[2] If a petitioner's net income or net current asset amounts are insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In the instant case, the accompanying labor certification states the proffered wage for the offered position of senior programmer analyst as $56,056 per year. The petition's priority date is July 31, 2006, the date the DOL accepted the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), for processing. *See* 8 C.F.R. § 204.5(d).

The record before the Director closed on December 30, 2014, with his receipt of the Petitioner's most recent motion. At that time, required evidence of the Petitioner's ability to pay in 2014 was not yet available. Therefore, we will consider the Petitioner's ability to pay only through 2013.[3]

The accompanying labor certification indicates the Petitioner's employment of the Beneficiary in the offered position since January 1, 2004. The Petitioner submitted copies of IRS Forms W-2 Wage and Tax Statements from 2006 through 2011. The Forms W-2 show the Petitioner's payments to the Beneficiary of the following annual wage amounts:

- $30,000 in 2006;
- $36,000 in 2007;
- $36,930 in 2008;
- $38,450 in 2009;
- $49,060 in 2010; and
- $59,710.06 in 2011.

The Forms W-2 demonstrate the Petitioner's ability to pay the proffered wage in 2011 because the wages it paid the Beneficiary that year exceeded the annual proffered wage of $56,056. The Forms W-2 do not demonstrate the Petitioner's ability to pay in any other years based on the wages it paid the beneficiary. However, we credit the wages paid to a beneficiary. A petitioner need only demonstrate its ability to pay the difference between the wages paid each year and the proffered wage.

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[2] Federal courts have upheld our method of determining a petitioner's ability to pay. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).

[3] The Petitioner submitted a copy of its 2014 financial statements, as of August 31, 2014. However, we will not consider the statements. They do not indicate that they were audited pursuant to 8 C.F.R. § 204.5(g)(2).

The following table shows the annual amounts the Petitioner must demonstrate its ability to pay, and its corresponding annual net income and net current asset amounts as reflected on its federal income tax returns.

Year	Amount to be Paid	Net Income	Net Current Assets
2006	$26,056	$(670)	Not Shown
2007	$20,056	$636	$92,874
2008	$19,126	$(430)	$95,458
2009	$17,606	$(12,711)	$84,556
2010	$6,996	$(138)	$82,783
2012	$56,056	$56,889	$218,947
2013	$56,056	$2,370	$221,798

The Petitioner's tax returns reflect sufficient net current assets in 2007, 2008, 2009, 2010, 2012, and 2013. The returns also reflect sufficient net income in 2012. However, we do not find the Petitioner's tax returns to be reliable evidence of its ability to pay. The returns from 2011 through 2013 state net current asset amounts inconsistent with the record.

The 2011 tax return indicates that the Petitioner's annual net current asset amount derives primarily from two loans by the Petitioner to other companies managed by the Petitioner's president/sole shareholder. "Statement 5" of the return indicates that the $642,816 amount in "[o]ther current assets" on Schedule L to IRS Form 1120 U.S. Corporation Income Tax Return consists of expected payments of $597,816 "due from [redacted] and $45,000 "due from [redacted]" Online government records identify the Petitioner's president/sole shareholder as the general partner of [redacted], [redacted] and the sole manager of [redacted] *See* Tex. Office of Comptroller, "Franchise Tax Status," at [redacted]

The Petitioner's federal income tax return indicates that it began 2011 with total assets of $87,131. Its 2011 tax return indicates gross revenues of $146,663. Thus, the record does not indicate the Petitioner's possession of $642,816 in 2011 to loan to the companies. Tax returns for later years also do not indicate the Petitioner's receipt of any interest income from the purported loans. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

The Petitioner's tax returns also indicate "[o]ther current assets" of more than $400,000 in both 2012 and 2013, stemming from additional apparent loans by the petitioner to [redacted] The record also does

[4] The 2013 tax return also indicates $17,545 in "[o]ther current assets" stemming from the Petitioner's apparent loan to [redacted] We were unable to locate information about a company named [redacted] However, online government information identifies the Petitioner's president/sole shareholder as the sole manager of [redacted] *See* Tex. Office of Comptroller, Franchise Tax Status, at [redacted] (accessed Oct. 21, 2015). [redacted]

not indicate the Petitioner's possession of sufficient funds for these additional purported loans. Because the record does not explain the Petitioner's "[o]ther current assets" from 2011 through 2013, we will not credit its tax returns from those years as reliable evidence of its ability to pay. The inconsistencies in the tax returns from 2011 to 2013 also cast doubt on the reliability of the Petitioner's tax returns for other years. *See Ho*, 19 I&N Dec. at 591 (stating that doubt cast on one aspect of a petitioner's proof may lead to a reevaluation of the sufficiency and reliability of its remaining evidence in support of a petition).

Thus, based on examinations of the wages the Petitioner paid the Beneficiary, its annual net income amounts, and its annual net current asset amounts, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

The Petitioner argues that additional compensation it paid to the Beneficiary in 2006 establishes its ability to pay. In addition to the Forms W-2 previously discussed, the record contains copies of IRS Forms 1099-MISC Miscellaneous Income from 2006 through 2010. The Forms 1099-MISC indicate the Petitioner's payments to the Beneficiary of the following annual amounts of "[n]onemployee compensation:" $16,742.34 in 2006; $7,710.31 in 2007; $4,250 in 2008; $9,430 in 2009; and $4,800 in 2010. The forms also indicate the Petitioner's payments to the Beneficiary of the following amounts of "[s]ubstitute payments in lieu of dividends or interest:" $8,600 in 2006; and $17,970 in 2008.

The Petitioner urges us to treat the amounts reflected on the Forms 1099-MISC like additional wages it paid to the Beneficiary. The Petitioner argues that U.S. Department of Treasury regulations state that miscellaneous income amounts on Forms 1099 include "[s]alaries, wages, commissions, fees, and other forms of compensation for services rendered aggregating $600 or more." *See* 26 C.F.R. § 1.6041-1(a)(1)(A).

In proceedings involving the Petitioner's prior petition for the Beneficiary, the Petitioner described the origins of the income amounts on the Forms 1099-MISC. In a September 27, 2012 letter, the Petitioner's president/sole shareholder stated that the Petitioner paid the beneficiary $16,742.34 in nonemployee compensation in 2006 for computer-related work he performed for the company from his home at night. The president/sole shareholder stated that the $8,600 in substitute payments in lieu of dividends or interest that year included an $8,000 "personal loan" to the Beneficiary and a $600 payment for his unused vacation time. The letter states that the annual income amounts on the Forms 1099-MISC for 2007, 2008, 2009, and 2010 all reflect compensation for computer-related services performed by the Beneficiary for the company and for his unused vacation time in those years.

The record does not support the Petitioner's claimed issuance of additional compensation payments in the amounts indicated on the Forms 1099-MISC. The Petitioner's letter suggests that most of the

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owned a 380-unit apartment complex at Texas, which it sold in 2014. "Real estate transactions," at (accessed Oct. 21, 2015). It is unclear whether the Petitioner loaned the referenced $17,545 to

payments represent additional compensation to the Beneficiary as part of his employment with the Petitioner as a programmer analyst. However, online IRS information states that employers should report employee wages and bonuses on Forms W-2, not on Forms 1099-MISC, which are designed to report compensation to non-employees. Internal Revenue Serv., Instructions of Form 1099-MISC, at http://www.irs.gov/pub/irs-pdf/i1099msc.pdf (accessed July 1, 2015). The record does not explain why the Petitioner reported the Beneficiary's additional, purported compensation on Forms 1099-MISC.

The Forms 1099-MISC also inconsistently characterize the Beneficiary's compensation. The 2006 form reports the claimed $16,742.34 in compensation for the Beneficiary's computer-related work as non-employee compensation. However, the 2008 form characterizes some of the payments for the Beneficiary's computer-related work as non-employee compensation, and some as substitute payments in lieu of dividends or interest. The record does not explain the inconsistent characterization of the Beneficiary's compensation on the Forms 1099-MISC.

The Petitioner's explanation of the additional payments also conflicts with the Beneficiary's federal income tax returns. The Petitioner's letter states that the amounts on the 2008 and 2009 Forms 1099-MISC reflect payments for computer-related services and unused vacation time. However, the Beneficiary's 2008 tax return reports $4,250 of the total payment as income from his "property management" business. His 2009 return characterizes that year's entire $9,430 payment as income from his "consulting" business.

The inconsistences of record cast doubts on the nature and existence of the payments reported on the Forms 1099-MISC. *See Ho*, 19 I&N Dec. at 591-92 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The record therefore does not establish the Petitioner's additional compensation of the Beneficiary for services rendered or the availability of the funds to otherwise pay the proffered wage.

Also, the nature of the Petitioner's 2006 "loan" to the Beneficiary is unclear. The Petitioner's letter suggests that it loaned the Beneficiary $8,000. The letter states: "The remaining $8,000.00 was a personal loan that he took from the company." However, the reporting of the loan as "income" by the Petitioner on the 2006 Form 1099-MISC and by the Beneficiary on his 2006 tax return suggests that the Beneficiary received $8,000 in reduced-interest compensation from a low-interest or no-interest loan. The Petitioner's letter does not discuss the terms of its loan to the Beneficiary. Its tax returns neither mention the loan nor indicate its receipt of any interest income.

Whatever the nature of the loan, the record does not establish that the $8,000 payment constituted compensation to the Beneficiary for services rendered. We therefore will not treat the $8,000 amount like additional wages paid to the Beneficiary. The record also does not establish that this amount was otherwise available to pay the proffered wage.

The record does not support the Petitioner's explanation of the payments reflected on the Forms 1099-MISC. The payments therefore do not demonstrate the Petitioner's ability to pay the proffered wage in 2006.

The Petitioner also argues that its amended 2006 federal income tax return demonstrates its ability to pay the proffered wage. With its most recent motion, the Petitioner submitted a copy of an amended 2006 tax return, which indicates year-end net current assets of $62,714. The 2006 tax return originally submitted with the petition, dated September 17, 2007, did not state the Petitioner's net current assets. The Schedule L to IRS Form 1120 was blank. The amended return, dated June 7, 2013, contains a completed Schedule L.

The Petitioner's amendment of its 2006 federal tax return almost six years after the return's original submission suggests that it revised the return solely for purposes of demonstrating its ability to pay the proffered wage. Without evidence that the Petitioner submitted the amended return to the IRS, we will not consider the contents of the amended return to be reliable.[5]

The instant record does not contain evidence of the Petitioner's submission of the amended 2006 tax return to the IRS. On appeal, the Petitioner states that it will provide "the Tax Account Transcript issued by the Internal Revenue Service, which reflects the IRS's acceptance of the amended tax returns" within 30 days of the appeal's filing. As of this decision's date, however, we have not received a tax account transcript or other evidence of the IRS's receipt of the amended return. We therefore do not consider the contents of the amended return to be reliable and will not consider it as evidence of the Petitioner's ability to pay.

Even if we did consider the Petitioner's amended 2006 tax return, the record would not establish the return's proper statement of the Petitioner's net current assets. The majority of the stated net current assets in 2006 appear to derive from a loan by the Petitioner to its president/sole shareholder. "Statement 3" in the amended tax return states "[o]ther current assets" of $75,000 "due from [redacted] However, the record does not establish the Petitioner's possession of $75,000 in 2006 to loan to its president/sole shareholder. The amended tax return indicates that the Petitioner began 2006 with $39,583 in total assets and suffered an operating loss for the year. The Petitioner's tax returns in subsequent years also do not report any interest income from a loan. Therefore, even if we considered the Petitioner's amended 2006 tax return, the record would not otherwise support the existence of the loan or explain how the Petitioner came to possess $75,000 to lend to its president/sole shareholder. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (stating that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings).

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[5] The Director did not consider the amended 2006 tax return, finding that the Petitioner should have submitted it within three years of the original return's filing date. *See* Internal Revenue Serv., Form 1120X, Amended U.S. Corporation Tax Return, 3, at http://www.irs.gov/pub/irs-pdf/f1120x.pdf (accessed Oct. 21, 2015) (stating that an amended corporate tax return must generally be filed within three years of the date the corporation filed its original return). However, the Petitioner's amended return does not seek to correct errors in its income, deductions, or credits affecting the amount of tax it paid. The amendment only completes Schedule L to Form 1120, which the Petitioner was not required to fill in. *Id.*, Instructions to Form 1120, at http://www.irs.gov/pub/irs-pdf/i1120.pdf (accessed Oct. 21, 2015) (stating that corporations with total year-end receipts and assets of less than $250,000 need not complete Schedule L). Thus, despite the delay in the Schedule L's completion, we would consider the Petitioner's amended 2006 tax return if it contained evidence of its receipt by the IRS.

In addition, as stated in our January 31, 2013, decision on the Petitioner's prior petition, USCIS records indicate the Petitioner's filing of I-140 petitions for two other beneficiaries that remained pending after the instant petition's priority date.[6] A petitioner must demonstrate its continuing ability to pay the proffered wage for each petition it files. 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977). Therefore, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its two other petitions. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other two beneficiaries obtain lawful permanent resident, or until their petitions are denied, withdrawn, or revoked.

In the prior petition proceedings, the Petitioner submitted evidence of the proffered wages and priority dates of the other petitions and of its payments to the other beneficiaries. The following table shows the annual combined proffered wages of all three of the Petitioner's beneficiaries, the annual wages paid to them by the Petitioner, and the Petitioner's reported annual net income and net current asset amounts from 2006 through 2010.

Year	Proffered Wages	Wages Paid	Net Income	Net Current Assets
2006	$102,107	$ 63,125.75	$ (670)	Not shown
2007	$183,872	$129,768.14	$ 636	$92,874
2008	$183,872	$119,287.00	$ (430)	$95,458
2009	$183,872	$126,440.00	$(12,711)	$84,556
2010	$183,872	$131,468.82	$ (138)	$82,783

Thus, the record does not establish the Petitioner's ability to pay the combined proffered wages of its beneficiaries in 2006. The amounts of "combined wages paid" to the beneficiaries in the table do not include payments reflected on Forms 1099-MISC. Like the instant Beneficiary, the Petitioner's two other beneficiaries received payments on Forms 1099-MISC in some years, in addition to wages stated on Forms W-2. However, even if we included all the payments on Forms 1099-MISC and credited the net income and net current assets amounts on the Petitioner's tax returns, the record would not establish its ability to pay the combined proffered wages of the instant Beneficiary and one of the other beneficiaries in 2006.[7] The total combined amount of wages paid would be $99,097.75, less than the combined proffered wages of $102,107.

As previously indicated, in determining a petitioner's ability to pay the proffered wage, we may also consider the overall magnitude of its business activities. *See Sonegawa,* 12 I&N Dec. at 614-15 (Reg'l Comm'r 1967). In *Sonegawa*, the petitioner had conducted business for more than 11 years,

[6] USCIS records identify the receipt numbers of the petitioner's two other petitions as [redacted] and [redacted]

[7] The priority date of the third beneficiary's petition is November 16, 2007. Therefore, the Petitioner need demonstrate its ability to pay this Beneficiary's proffered wage in 2006.

routinely earning annual net income of about $100,000. In the year of the petition's filing, however, the petitioner relocated its business and its tax return did not reflect its ability to pay the proffered wage. As a result of its relocation, the petitioner paid rents on two locations for a five-month period, incurred substantial moving costs, and suspended business for a brief period. Despite the petitioner's financial difficulties, the Regional Commissioner found that the petitioner would likely resume successful business operations and had established its ability to pay. The petitioner was a fashion designer whose work had been featured in national magazines. The petitioner established that her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. The petitioner also demonstrated that she lectured at U.S. design and fashion shows and at California colleges and universities.

As in *Sonegawa*, we may consider evidence of the Petitioner's ability to pay beyond its net income and net current asset amounts. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the Beneficiary will replace a former employee or an outsourced service; and other evidence of its ability to pay the proffered wage.

The instant record indicates the Petitioner's continuous business operations since 1996. Payroll tax records indicate the Petitioner's employment of as many as seven people in 2007. However, the most recent payroll tax return of record states the Petitioner's employment of two people in 2011. Even if we credit the information on the Petitioner's tax returns, the returns indicate that its annual gross revenues and amounts of wages paid have declined substantially since the petition's priority date.

Unlike in *Sonegawa*, the record does not contain evidence of uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its field. The record also does not indicate the Beneficiary's replacement of a former employee or an outsourced service.

Thus, considering the totality of the circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the denials of the petition and the Petitioner's most recent motion on this ground.

II. THE PETITIONER'S INTENTION TO EMPLOY THE BENEFICIARY IN THE OFFERED POSITION

Beyond the Director's decision, the record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position.[8]

[8] We may deny a petition on valid grounds unidentified by a director in the decision below. *See* 5 U.S.C. § 557(b) (stating that, except as limited by notice or rule, an administrative agency retains all the powers on review that it possessed in making the original decision).

A labor certification remains valid only for the particular job opportunity, the foreign national, and the geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966).

In the instant case, the accompanying labor certification states that the offered position of senior programmer analyst involves, in part, "direct[ing] programmers and analysts to make database system changes," and "[t]rain[ing] users." (emphases added). The job duties therefore indicate that the offered position involves directing and training others.

As previously indicated, the record indicates a decline in the number of the Petitioner's employees. A payroll tax record shows the Petitioner's employment of seven people in 2007. However, the Petitioner's most recent payroll tax return of record states its employment of two people in 2011.

Based on the apparent decline in the number of the Petitioner's employees, the record does not establish the existence of other programmers and analysts to be directed, or users to be trained. *See Ho*, 19 I&N Dec. at 591-92 (stating that a petitioner must resolve inconsistencies of record by independent, objective evidence). The record therefore does not establish the Petitioner's intention to employ the Beneficiary in the offered position pursuant to the terms of the labor certification.

III. CONCLUSION

The record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision. The record also does not establish the Petitioner's intention to employ the Beneficiary in the offered position pursuant to the terms of the accompanying labor certification. We will also dismiss the Petitioner's appeal on this ground.

The petition will be denied for the above stated reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of proving eligibility for the benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N-P-M-, Inc.*, ID# 14176 (AAO Oct. 26, 2015)